

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1777CV01367

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MARGARET DEWEESE-BOYD

vs.

GORDON COLLEGE & others¹

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR
BIFURCATED DISCOVERY**

INTRODUCTION

This case arises out of plaintiff Margaret DeWeese-Boyd's ("DeWeese-Boyd's") contention that defendants Gordon College, D. Michael Lindsay, and Janel Curry (collectively, the "Gordon Defendants") discriminated against her by denying her application for promotion from associate professor to full professor. In connection with this allegation, on September 13, 2017, DeWeese-Boyd filed suit against the Gordon Defendants, asserting claims for: retaliation (Count I); discrimination, in violation of G. L. c. 151B (Count II); aiding and abetting and interference, in violation of G. L. c. 151B (Count III); violation of the Massachusetts Civil Rights Act (the "MCRA"), G. L. c. 12, §§ 11H and 11I (Count IV); tortious interference with contractual and/or advantageous relations (Count V); breach of contract (Count VI); and breach of covenant of the covenant of good faith and fair dealing (Count VII).

This matter is currently before the court on the Gordon Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Bifurcated Discovery. Therein, the Gordon Defendants argue that DeWeese-Boyd's claims are barred both by a "ministerial exception"

¹ D. Michael Lindsay and Janel Curry

grounded in the First Amendment's free exercise of religion clause as well as by their First Amendment right to freedom of expressive association. In addition, in the alternative, the Gordon Defendants request that, if the court determines the issues they raise concerning the First Amendment cannot be decided at this juncture, that the court bifurcate discovery to enable them to address the First Amendment and religious institution issues as threshold matters. After hearing, consideration of the arguments, and review of the relevant case law, the Gordon Defendants' Motion for Judgment on the Pleadings is **DENIED**. Further, the court reserves judgment on the request for bifurcated discovery until the Rule 20 conference, which is scheduled for July 25, 2018.

BACKGROUND

The following facts are contained in the Complaint; they are presumed true for the purposes of analyzing the Motion for Judgment on the Pleadings.

DeWeese-Boyd is employed as a tenured associate professor in the Department of Sociology and Social Work at Gordon College, a private liberal arts college located in Wenham, Massachusetts. She began her employment with Gordon College in 1999. In February 2017, despite the unanimous recommendation of Gordon College's Faculty Senate, DeWeese-Boyd was denied a promotion from associate professor to full professor.

DeWeese-Boyd is not an ordained minister; she has not served as a minister at Gordon College; and she teaches no religious topics at Gordon College. DeWeese-Boyd's areas of academic focus involve community-based development, sustainable development, and issues related to social justice. While employed at Gordon College, DeWeese-Boyd has been actively involved in opposing Gordon College's policies and practices relating to LGBTQ+ issues and advocating for the rights of LGBTQ+ individuals at Gordon College. DeWeese-Boyd has a long

history of activism in this regard, dating back to at least 2013.² In fact, over the past several years, DeWeese-Boyd has been one of the most vocal critics at Gordon College regarding the college's practices and policies as they relate to the LGBTQ+ community.

In September 2016, DeWeese-Boyd applied for a promotion to become a full professor at Gordon College. She received the unanimous recommendation of Gordon College's Faculty Senate. Despite this recommendation, however, the Gordon Defendants denied DeWeese-Boyd's application based on scholarship that did not "reach acceptable levels." Now, DeWeese-Boyd argues that the reasons the Gordon Defendants articulated for denying her promotion were pre-textual. She claims the articulated reasons were intentionally false, in order to mask the Gordon Defendant's discriminatory purposes. According to DeWeese-Boyd, the real reason the Gordon Defendants denied her promotion is because of her activism with respect to LGBTQ+ issues.

DISCUSSION

The Gordon Defendants claim that, under the First Amendment to the United States Constitution, the court must dismiss the Complaint because allowing DeWeese-Boyd's claims to proceed would violate the constitutional protection afforded to "a religious group's right to shape its own faith and mission through appointments" and to have its "internal governance" shielded from government interference. See *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 188-189 (2012). The Gordon Defendants argue further that allowing the Complaint to proceed would separately violate their First Amendment right to freedom of

² For purposes of the pending motion, the court need not address each instance of activism DeWeese-Boyd alleges, nor does the court need to address every factual allegation contained within the Complaint. The Gordon Defendants' Motion for Judgment on the Pleadings raises constitutional issues and, the description provided of the alleged facts is sufficient for the court's ruling at this stage of the proceedings.

expressive association by interfering with their right to advocate for their well-defined, public, core beliefs. See *Boy Scout of America v. Dale*, 530 U.S. 640, 648 (2000).

A. Standard of Review

After the pleadings are closed, any party may move for judgment on the pleadings under Mass. R. Civ. P. 12(c). “Rule 12(c) is designed to cover the rare case where the answer admits all the material allegations of the complaint (or the reply admits all the allegations of the counterclaim) so that no material issue of fact remains for adjudication.” Mass. R. Civ. P. 12(c), Reporter’s Notes (1973). Such a motion is treated as a motion to dismiss for failure to state a claim upon which relief can be granted under Mass. R. Civ. P. 12(b)(6). *Jaroz v. Palmer*, 436 Mass. 526, 529 (2002).

To survive a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), a complaint must set forth the basis of the plaintiff’s entitlement to relief with “more than labels and conclusions.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While factual allegations need not be detailed, they “must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . .” *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 555. At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires that the complaint set forth “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief . . .” *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557.

B. Constitutional Issues

The First Amendment provides, in relevant part, that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]” In 2012 the Supreme Court in *Hosanna*, recognized, for the first time, a “ministerial exception” grounded in

the First Amendment's "free exercise" clause, which precludes application of Federal employment discrimination laws to claims arising out of the employment relationship between a religious institution and its ministers. 565 U.S. at 188. Similarly, around the same time, the Supreme Judicial Court concluded that the First Amendment also precludes application of State anti-discrimination laws to employment decisions religious institutions make regarding their ministers. *Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, 463 Mass. 472, 476-477 (2012).

The First Amendment mandates the "ministerial" exception. Otherwise, courts would be asked to "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna*, 565 U.S. at 188. In order to protect against such interference, the ministerial exception is applied broadly. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone." *Id.* at 194-195. For this reason, a decision applying the ministerial exception bars all employment discrimination claims related to hiring and firing, not just those decisions closely related to the institution's religious beliefs. See *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132, 1143 (D. Or. 2017).

At issue in the present case, then, is whether DeWeese-Boyd is a minister of a religious institution for First Amendment purposes. And, whether such a determination can be made at this stage in the proceedings without a more developed record.

In the first instance, to demonstrate they are entitled to application of the ministerial exception, the Gordon Defendants must establish that Gordon College is a religious institution. The fact that Gordon College is not actually a church does not automatically foreclose

application of the ministerial exception. Many courts have held that the term “religious institution” includes religiously affiliated schools, hospitals, and corporations. See *EEOC v. Catholic Univ.*, 83 F.3d 455, 461 (D.C. Cir. 1996) (church-affiliated university); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324 (3rd Cir. 1993) (church-operated school); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2nd Cir. 1993) (church-operated school); *Scharon v. St. Luke’s Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (church-affiliated hospital); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989) (non-profit religious corporation). The determinative question is whether Gordon College constitutes an integral mission of the college’s religious affiliation. See *Lemon v. Kutzman*, 403 U.S. 602, 615-616 (1971). In answering this inquiry, courts look to the specific characteristics of the school at issue to determine if those characteristics make the school a tool for transmitting the faith to the next generation. *Id.* The reason, of course, is because “[t]he substantial religious character of these [types] [of] church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.” *Id.*

Determining whether Gordon College is a religious institution under the First Amendment for purposes of the ministerial exception is fact specific. The Gordon Defendants would have the court simply declare Gordon College a religious institution based on their Answer to the Complaint and the documents attached thereto. The court is unwilling to do so. Given the fact intensive nature of this determination, the court concludes that DeWeese-Boyd is entitled to discovery and, that the court should have a more developed record before making such a finding.

Likewise, the record in this case is not sufficiently developed to determine whether DeWeese-Boyd can be considered a minister. DeWeese-Boyd's status as a minister and whether the ministerial exception applies requires the court to determine whether she played an important role as an instrument of her church's religious message and as a leader of its worship activities. See *Hosanna*, 565 U.S. at 191-192. In connection with this inquiry, the *Hosanna* Court outlined several factors to consider in whether an employee fits within the ministerial exception, including the title of the employee's position, the substance reflected in that title, the qualifications needed for the position, and important religious functions performed by the employee. As already stated by the court, these fact specific findings are best left to a fully developed record. Given the Supreme Court's unwillingness to "adopt a rigid formula for deciding when an employee qualifies as a minister," it would be premature to make such a finding at this stage in the proceedings. *Id.* at 190.

At the risk of sounding like a broken record, at this stage in the proceedings, the court also declines to rule that allowing the Complaint to proceed would violate the Gordon Defendants' First Amendment right to freedom of expressive association by interfering with their right to advocate their well-defined, public, core beliefs. See *Dale*, 530 U.S. at 648. Just as determining whether the ministerial exception applies in the present matter requires a developed factual record, so too does analyzing the Gordon Defendants' First Amendment right to freedom of expressive association.

Like the analysis conducted with respect to the ministerial exception, the court must first determine whether the Gordon Defendants are protected by the First Amendment's right to free expressive association by determining whether they engage in "expressive association" central to their general mission. *Id.* at 648-649. As stated in *Dale*, however, "[b]ecause this is a First

Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, [the court] [is] obligated to independently review the factual record to ensure that . . . [it] does not unlawfully intrude on free expression.” *Id.* at 648-649. Such a fact specific determination is better left to a fully developed record.

Next, even if the court were to determine that the Gordon Defendants are engaged in expressive association protected by the First Amendment, the court must still find that the Commonwealth’s anti-discrimination laws run afoul of those laws in this instance. In particular, the court must balance the legitimate state interest in eliminating discrimination with the Gordon Defendants’ constitutional right to freedom of expressive association. To overcome the Gordon Defendants’ constitutional rights, under traditional First Amendment analysis, DeWeese-Boyd is required to show that the Commonwealth’s interest in eliminating discrimination is compelling. *Id.* at 657-659. Again, a fuller record is required for such an analysis.

Lastly, the court notes that DeWeese-Boyd disputes every essential claim the Gordon Defendants make in their motion. She disputes that Gordon College is a religious institution. DeWeese-Boyd disputes she is a minister for First Amendment purposes. She disputes that the Gordon Defendants are engaging in expressive association central to Gordon College’s mission. And finally, DeWeese-Boyd disputes the contention that the Commonwealth’s anti-discrimination laws run afoul of any right of expressive association that the Gordon Defendants may have. Certainly, such determinations are issues of law, but they are heavily dependent on facts that DeWeese-Boyd disputes in the Complaint. Only a full record will serve to identify all the facts necessary for a proper adjudication of the First Amendment claims the Gordon Defendants raise.

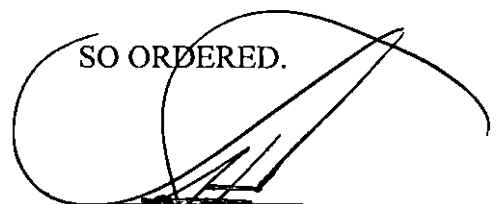
The court acknowledges, as the Gordon Defendants point out, that, under certain circumstances, dismissal pursuant to Rule 12(b)(6) and 12(c) is appropriate in cases alleging violations of First Amendment rights. See *Temple Emanuel*, 463 Mass. at 484 (departing from the usual practice of remanding cases for further administrative proceedings when the case had been fully briefed and the issue with respect to the applicability of the ministerial exception could be resolved based on undisputed facts). In *Temple Emanuel*, however, there was no dispute as to the mission of the Jewish school, that it was a religious institution, or that the plaintiff was a religious teacher. In contrast, here, almost all the relevant facts raised by the Gordon Defendants in the Motion for Judgment on the Pleadings are disputed. Given these disputes, dismissal is not warranted at this stage in the proceedings.

In the Motion for Judgment on the Pleadings, the Gordon Defendants seek dismissal of all claims. Because all of the other arguments the Gordon Defendants raise in their motion stem from the constitutional arguments addressed above, the court denies the Motion for Judgment on the Pleadings as to all counts.

CONCLUSION AND ORDER

For the foregoing reasons, the Motion for Judgment on the Pleadings is **DENIED**. The court reserves judgment on the Gordon Defendants' request for bifurcated discovery until the Rule 20 conference, which is scheduled for July 25, 2018.

SO ORDERED.



Salim Rodriguez Tabit
Associate Justice of the Superior Court

Dated: July 13, 2018